**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **WILLIE E. BENFORD** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 216,822 |
| **GREDE FOUNDRIES, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **WAUSAU UNDERWRITERS INS. CO.** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appealed Administrative Law Judge Nelsonna Potts Barnes' Award dated June 30, 1998. The Appeals Board heard oral argument in Wichita, Kansas, on February 12, 1999.

### APPEARANCES

Claimant appeared by his attorney, Dennis L. Phelps of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kasey Alan Rogg of Wichita, Kansas.

### RECORD

The Appeals Board has considered the record as listed in the Award. Additionally, the Appeals Board has considered as part of the record the deposition testimony of Berniece Benford taken on July 23, 1997. This deposition was inadvertently not listed in the Award.

### STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Award.

## ISSUES

The Administrative Law Judge found claimant suffered a low-back injury on January 27, 1996, while working for the respondent. She further found claimant proved he was entitled to a 74.25 percent work disability.

Respondent contends claimant failed to prove he suffered a low-back injury while working for the respondent. Furthermore if, claimant's low-back injury is found to be compensable, claimant is not entitled to a work disability award because respondent terminated claimant for altering a medical off work slip.

Respondent also filed a motion to strike claimant's response brief. Respondent asserts claimant's brief was due on September 9, 1998, and was not filed until February 4, 1999. Therefore, respondent contends claimant's brief is clearly out of time, should be stricken from the record, and should not be considered by the Appeals Board.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

### Did claimant suffer a low-back injury while working for the respondent?

The Administrative Law Judge found claimant suffered a work-related low-back injury on January 27, 1996. She concluded claimant's testimony and the medical testimony was persuasive that claimant's low-back injury was related to the January 27, 1996, work accident. The Appeals Board agrees with this conclusion.

On the date of claimant's accident, claimant testified he was relighting furnaces at respondent's foundry when he picked up a bucket of material, felt a pop, and then pain in his lower back. He immediately notified his supervisor who had claimant sit down and rest. But claimant's back remained symptomatic, and the supervisor sent claimant home.

The respondent first provided medical care through the company physician, Parula P. Raghavan, M.D. Dr. Raghavan then referred claimant to orthopedic surgeon Anthony G. A. Pollock, M.D.

Dr. Pollock saw claimant for the first time on March 13, 1996. He found claimant with a low-back strain. Dr. Raghavan previously had claimant undergo a CT lumbar spine examination on February 16, 1996. This indicated a mild bulging disc at L4-L5. Dr. Pollock had claimant undergo an MRI lumbar spine examination on July 22, 1996, that did not find a bulging disc at L 4-5. But the MRI did find degenerative desiccation of the nucleus pulposus at L4-5. Dr. Pollock provided conservative treatment for claimant's low-back injury in the form of pain medication, physical therapy, extensive exercises, and epidural injections.

Claimant was under Dr. Pollock's treatment from March 13, 1996, until September 3, 1996. During that period, the doctor took claimant off work for certain periods of time and also returned claimant to periods of light work.

Other than the degenerative desiccated disc found by the July 1996 MRI, Dr. Pollock could not find any objective evidence to substantiate claimant's severe subjective complaints. Dr. Pollock finally concluded, that in his opinion, claimant was a symptom magnifier. But he did not conclude that claimant was a malinger. Dr. Pollock, however, testified claimant did hurt his back while lifting at work on January 27, 1996. He attributed a minimum of 2 or 3 percent permanent functional impairment to the work-related accident and claimant's desiccated disc. Dr. Pollock released claimant from treatment to regular work without restrictions on September 9, 1996.

Philip R. Mills, M.D., a physical medicine and rehabilitation physician, was appointed by the Administrative Law Judge to examined claimant and determine, if necessary, appropriate treatment recommendations for claimant's continuing low-back symptoms. Dr. Mills saw claimant once on December 5, 1996, and diagnosed claimant with bulging discopathy and degenerative arthritis of the low back. The doctor recommended that claimant lose weight, start a walking/exercise program, not perform the heavy foundry work, perform activities with good body mechanics, and avoid prolonged or repetitious forward flexion or stooping. In accordance with the AMA Guides for Evaluation of Permanent Impairment, Fourth Edition, Dr. Mills placed claimant in DRE Lumbosacral Category II resulting in a 5 percent whole body functional impairment rating. He attributed claimant's low-back symptoms and permanent functional impairment to the January 27, 1996, work-related accident. Dr. Mills did not find claimant to be a symptom magnifier.

Respondent concentrates its argument that claimant failed to prove he suffered an accidental injury arising out of and in the course of employment while working for the respondent on the fact that Dr. Pollock found claimant to exaggerate or magnify his low-back symptoms. But a symptom magnifier only has complaints that are greater than the level of his or her injury. When a person magnifies his or her symptoms, it does not mean he or she is not injured. Thus, the Appeals Board concludes, when the record as a whole is considered, claimant has proved his low back was injured at work on January 27, 1996.

**What is the nature and extent of claimant's disability?**

After claimant's January 27, 1996, injury, Dr. Pollock took claimant off work for short periods and returned him to light work until he was released from treatment to return to regular work without restrictions on September 9, 1996. While Dr. Pollock was treating claimant's low-back injury, claimant also injured his right thumb in a June 1996 work accident. The right thumb injury is not included in this claim. Claimant had surgery on his right thumb on September 11, 1996, only two days after he was released by Dr. Pollock to return to work.

Orthopedic surgeon Tyrone D. Artz, M.D., operated on claimant's right thumb at the Surgical Center of Kansas located in Wichita, Kansas. This is an outpatient surgical clinic.

Claimant was operated on at approximately 8:45 a.m. and discharged to go home at 11:45 a.m. At the time of claimant's discharge, he was given a work status slip signed by Dr. Artz. The work status slip was made out in triplicate with the original going to the patient, one copy staying at the surgical clinic, and the other copy going with the claimant's medical records. Claimant was to return to see Dr. Artz for a follow-up appointment two weeks from his date of surgery at 1:45 p.m. on September 25, 1996.

The work status slip was delivered to the respondent on the day of claimant's surgery by claimant's wife. Later the respondent discovered the original work status slip that was delivered to the respondent read that claimant was to be "off work for 2 ½ wks", where the other copy left at the surgical clinic read only "2 wks". The respondent confronted claimant with this discrepancy. The claimant told the respondent that the nurse working at the surgical clinic had changed the work status slip before his discharge from 2 to 2 ½ weeks at his request. Claimant testified he requested the change because he needed the other one half week to cover him until his return appointment with Dr. Artz.

Respondent investigated the change in the work status slip and found no one at the surgical clinic either remembered or admitted making the change. Respondent again confronted claimant with this information on September 25, 1996, and gave claimant until October 2, 1996, to prove someone at the surgical clinic had made the change. Claimant did not report back to the respondent.

In a letter dated October 3, 1996, to claimant from Terry J. Duckworth, respondent's human resources manager, the respondent notified claimant he was terminated for falsification of a medical record. The record contains the testimony of claimant, claimant's wife, claimant's mother, respondent's human resources manager, the surgical clinic recovery nurse, and the clinical director of the surgical clinic. All of these individuals testified in regard to the altered work status slip. The Appeals Board concludes the evidence in the record as a whole is persuasive that claimant either changed the work status slip himself or had the work status slip changed at his direction by someone other than an employee of Dr. Artz. Claimant's description of the nurse who attended him during his surgery recovery was consistent with the recovery nurse who testified and who established she was the nurse who attended claimant after surgery. The nurse also testified she did not change the work status slip and she was responsible for processing claimant's discharge. The recovery nurse further testified, if the work status slip would have been changed, a new work status slip would have been made out and signed by Dr. Artz. Additionally, the nurse testified that the work status slip had to be changed after claimant was discharged.

The Administrative Law Judge found claimant's discharge did not invoke the policy considerations announced in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foulk, the worker refused to even attempt to preform accommodated work. The court held the worker will not be awarded benefits based on refusing a job that the worker had the ability to perform. The wage of the accommodated job was imputed to the worker that limited the worker to an award based on functional impairment. Nevertheless, in this case, the Administrative Law Judge reasoned that one

isolated incident does not give rise to that level of misconduct. Thus, the Administrative Law Judge found claimant was entitled to a work disability assessment.

The Appeals Board disagrees with the Administrative Law Judge's conclusion. The respondent's human resources manager testified that claimant would have remained an employee of the respondent if he would not have been terminated because of the altered work status slip. Accordingly, the reason claimant is not earning a post-injury wage of at least 90 percent of his pre-injury wage is because he either altered or caused to be altered the work status slip. The Appeals Board concludes that the policy considerations as announced in Foulk do apply. Here, the evidence establishes that respondent would have returned claimant to work earning a comparable wage had claimant not been discharged for altering the work status slip. Thus, claimant's pre-injury average weekly wage will be imputed to limit claimant to permanent partial disability benefits based on his functional impairment rating. *See* K.S.A. 1996 Supp. 44-510e(a)(b).

Dr. Pollock and Dr. Mills both expressed opinions on claimant's permanent functional impairment as a result of his low-back injury. Dr. Mills was the only physician who based his opinion on the AMA Guides as required by K.S.A. 1996 Supp. 44-510e(a). Therefore, the Appeals Board concludes claimant is entitled to permanent partial disability benefits of 5 percent based on Dr. Mills' permanent functional impairment rating.

**Should the Appeals Board consider the arguments contained in claimant's brief filed out of time?**

Claimant filed a response to respondent's brief on February 4, 1999, when the brief was due September 9, 1998. K.A.R. 51-18-4 requires an appellee's brief to be submitted within 20 days after the appellant's brief.

The Appeals Board finds that the claimant failed to submit a response brief within 20 days from the date of the respondent's brief. Therefore, claimant's arguments contained in the brief will not be considered in deciding this appeal.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Nelsonna Potts Barnes' June 30, 1998, Award, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Willie E. Benford and against the respondent, Grede Foundries, Inc., and its insurance carrier, Wausau Underwriters Insurance Company, for an accidental injury which occurred on January 27, 1996, and based upon an average weekly wage of $534.43.

Claimant is entitled to 10 weeks of temporary total disability compensation at the rate of $326 per week or $3,260.00, followed by 20.75 weeks of permanent partial disability compensation at the rate of $326 per week or $6,764.50 for a 5% permanent partial general disability, making a total award of $10,024.50.

As of May 25, 1999, there is due and owing claimant 10 weeks of temporary total disability compensation at the rate of $326 per week or $3,260.00, and 20.75 weeks of permanent partial compensation at the rate of $326 per week or $6,764.50, for a total of $10,024.50 which is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board approves and adopts all remaining orders as set forth in the Award that are not inconsistent with this Order.

**IT IS SO ORDERED.**

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

**DISSENT**

Because I find that Mr. Benford did not alter the off work slip, I would affirm the Administrative Law Judge's decision.

BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS
Kasey Alan Rogg, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director